IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 1770 OF 2003

Avinash G. Gandhi .... Petitioner

versus

Smt. Kamalabai Bhupatrai Shah
and ors. ... .. Respondents.

Shri P.K.Dhakephalkar for the petitioner
None for the respondent.

CORAM; P.V. KAKADE, J.

DATED; FEBRUARY 22, 2006.

P.C:

1. Heard the learned counsel for the Petitioner. None appears for the respondent. Perused the record.

2. This petition is moved against the order passed by the appellant Small Cause Court dated 18-4-2002 discharging the Rule in the Revision Application No. 114/2000 in R.A.D. Suit No. 3775/90 confirming the order dated 9-6-2000 passed by the trial court in a suit filed by the plaintiff for declaration that he was tenant in the suit premises.

3. It appears from the record that during the course of the suit, the plaintiff's advocate requested

adjournment for filing affidavit of documents and time was granted for the same by the court. Thereafter the matter was adjourned from time to time for hearing. However, the plaintiff failed to file affidavit of documents on record and therefore the trial court recorded that the plaintiff have failed to proceed with the matter. Hence the suit was dismissed.

4. Against the said order, revision was preferred. The revisional court was of the view that impugned order was an order of dismissal for default and therefore application under Order 9 Rule 13 of CPC was requiired for setting aside the said order. With these observations, the revision was disposed of. Hence the petition.

5. At the outset it may be noted that by no stretch of imagination the impugned order dated 11-9-2000 could be said to be the order against which the remedy could be of under Order 9 Rule 13 of CPC which contemplates setting aside the decree passed exparte against the defendant. In the present case not only the plaintiff and his advocate was present but it was a case that failure of the plaintiff to file affidavit of documents to proceed with the matter for which purpose the suit came to be dismissed. The revisional court has taken a view that since remedy lie under Order 9 Rule 13 of CPC

the revisional jurisdiction cannot be invoked and revision was not maintainable.

6. In this regard it must be noted that the view taken by the revisional court is erroneous under Order 9 Rule 13 of CPC, for the obvious reason that both the plaintiff as well as his advocate were present when the impugned order came to be passed and under the circumstances, it could not be said to be an order which was passed exparte which would give rise remedy under Order 9 Rule 13 of CPC. In other words, the court could proceed under such situation as it though git and the suit came to be dismissed. In view of this position, the revision was definitely maintainable and hence on that count the order passed by the revisional court that the revision under section 29(3)of the Bombay Rent Act is not maintainable and has to be set aside.

7. In this situation the trial court could proceed either under order 17(2) or Rule 3 which deals with the situation that the court may proceed notwithstanding either party fails to produce evidence etc. instead of dismissing the plaintiff's suit. In my view therefore, the order passed byu the trial court was not called for and matter could be set right by sadling cost on the plaintiff as conteplated under Order 17 Rule 2 of CPC.

Hence Rule is made absolute. Petition is allowed in terms of prayer clause (a). The trial court's order dated 9-6-2000 dismissing the suit is hereby set aside and the trial court is directed to take affidavit of documents of the plaintiff on record for which purpose the plaintiff shall appear before the trial court and file the affidavit of documents if any on 30-3-2006 at 11.00 a.m. on condition that costs of Rs. 2000/- shall be paid by the petitioner, out of which the amount of Rs. 1000/- shall be donated to the State Legal Authority. Remaining amount shall be paid to the respondent within four weeks from the date of this order.

9. Parties to act an authenticated copy of this order.

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